

1 HONORABLE MARSHA J. PECHMAN
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 BARBARA LEWIS, as Personal Representative
11 of the Estate of JOHN ROBERT LEWIS,
12 Deceased,

13 Plaintiff,

14 v.

15 TODD SHIPYARDS CORPORATION, et al.,

16 Defendants.

17 NO. 2:11-CV-01300-MJP

18 DECLARATION OF JAMES E. HORNE IN
19 SUPPORT OF DEFENDANT FRASER'S
20 BOILER SERVICE, INC.'S OPPOSITION TO
21 PLAINTIFF'S MOTIONS IN LIMINE

22 I, JAMES E. HORNE, being first duly sworn on oath, do hereby depose and state as
23 follows:

24 1. I am one of the attorneys representing defendant Fraser's Boiler Service,
25 Inc. ("FBS") in this lawsuit. I submit this declaration in support of Defendant Fraser's
26 Boiler Service, Inc.'s Opposition to Plaintiff's Motions in Limine. I have personal
knowledge of the facts set forth in this declaration and could competently testify to them
under oath if called as a witness.

27 2. I have been involved in the present litigation only since April 15, 2015,
28 (approximately four months), having substituted in as counsel for FBS at that time. As
29 such, I was not personally involved in any aspect of the prior litigation in King County

1 Superior Court, in the U.S. District Court for the Western District of Washington, as part of
2 the MDL No. 875 action before the U.S. District Court for the Eastern District of
3 Pennsylvania, or for all but the last four months after the remand back to the U.S. District
4 Court for the Western District of Washington. I have, however, been able to piece
5 together from our incomplete records and files, and from other paper and electronic files
6 transferred to our office from the previous counsel for FBS, a timeline of events and at
7 least a partial explanation for the failure to file an Initial Disclosure on the part of FBS. In
8 addition, these documents show that Plaintiff has been well aware of FBS' intended two
9 fact trial witnesses since November 19, 2010, and that copies of the Expert Reports of
10 FBS' Expert Witnesses was provided to Plaintiff's counsel on May 9, 2012.

12 3. The present lawsuit initially was filed in the King County Superior Court on
13 or about June 25, 2008, under the caption *Barbara Jean Lewis as Personal*
14 *Representative of the Estate of John Robert Lewis v. Albay Construction Company, et al.*,
15 King County Superior Court No. 08-2-21991-7 SEA. A true and correct copy of Plaintiff's
16 Complaint is attached hereto as Exhibit A. Plaintiff's state court case proceeded through
17 normal litigation for 3 years and 1.5 months until August 5, 2011, at which time
18 Defendant Todd Shipyards Corporation ("Todd") filed a Notice of Removal to remove the
19 case from King County Superior Court to the U.S. District Court for the Western District of
20 Washington at Seattle.

22 4. Attached hereto as Exhibit B, is a true and correct copy of Defendant Todd
23 Shipyards Corporation's Submission of State Court Records and Proceedings, dated
24 August 12, 2011, showing that numerous disclosures and other documents had been
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1 filed with the King County Superior Court prior to Todd's removal of this action to federal
2 court.

3 5. Attached hereto as Exhibit C is a true and correct copy of Defendant
4 Fraser's Boiler Service, Inc.'s Fact Witness Disclosure dated November 19, 2010, from
5 the King County Superior Court lawsuit. That document discloses as fact witnesses on
6 behalf of FBS only two witnesses: (1) Bruce Fraser; and (2) Harry Fraser (via depositions).
7 Those are and have been the only two fact witnesses FBS has relied upon throughout the
8 history of this case.

9 10. Attached hereto as Exhibit D is a true and correct copy of Defendant
11 Fraser's Boiler Service, Inc.'s Expert Witness List dated May 28, 2010, from the King
12 County Superior Court lawsuit. That document, as is the custom and practice in King
13 County Superior Court, lists all potential expert witnesses that FBS anticipated might be
14 called as expert witnesses in the case. Included within that document are all three of
15 FBS' designated expert witnesses for the upcoming case in U.S. District Court: (1) John
16 Waterhouse, P.E.; (2) Dr. James C. Rock, P.E., C.I.H.; and (3) [Captain] Charles Wasson.
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18 7. Attached hereto as Exhibit E is a true and correct copy of the printout of
19 this Court's Docket obtained through WAWD CM/ECF showing the filings and dates of
20 filings of documents with the Clerk of the United States District Court for the Western
21 District of Washington in the case of *Lewis v. Todd Shipyards Corporation, et al.*, Civil
22 Docket No. No. 2:11-CV-01300-MJP.

23 8. Following removal from state court to the U.S. District Court, a Notice was
24 issued by the Court on August 8, 2011, indicating that Corporate Disclosure Statements
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1 must be filed by all parties by August 15, 2011. On August 9, 2011, FBS filed its
2 Corporate Disclosure Statement Pursuant to Fed. R. Civ. P. 7.1. (Docket Entry No. 7)

3 9. On September 6, 2011, this Court issued an Order regarding Initial
4 Disclosures, the Joint Status Report, and Early Settlement. Initial Disclosures were to be
5 filed by October 11, 2011. (Docket Entry No. 18)

6 10. Shortly thereafter, on September 13, 2011 (before Initial Disclosures were
7 due to be filed), an Order Lifting Stay of Conditional Transfer Order was issued and the
8 case was transferred to MDL No. 875 in the Eastern District of Pennsylvania.

9 11. While the case was pending before the U.S. District Court for the Eastern
10 District of Pennsylvania in MDL No. 875, the parties exchanged witness disclosures.
11 Attached hereto as Exhibits F and G, respectively, are true and correct copies of a cover
12 letter enclosing Expert Witness Reports and an e-mail from former FBS counsel to all
13 remaining counsel at the time, including Meredith Good, counsel for Plaintiff, enclosing
14 the Expert Witness Reports of (1) Captain Charles Wasson; (2) Dr. James Rock; and (3)
15 Phillip H. Allman, Ph.D, who was disclosed as a co-retained Economic Loss Expert on
16 behalf of FBS and Todd. That e-mail containing the expert witness disclosures is dated
17 May 9, 2012.

18 12. Attached hereto as Exhibit H is a true and correct copy of the May 9, 2012,
19 e-mail to counsel transmitting the Expert Witness Report of John Waterhouse. P.E.

20 13. Attached hereto as Exhibit I is a true and correct copy of the May 10, 2012,
21 e-mail from former FBS counsel to all remaining counsel at the time, including Meredith
22 Good, counsel for Plaintiff, enclosing additional materials to accompany the Expert
23 Witness Report of John Waterhouse. P.E.

1 13. While the case remained with the U.S. District Court for the Eastern District
 2 of Pennsylvania in MDL No. 875, the Court eventually got around to hearing and deciding
 3 summary judgment motions before the remaining claims were remanded to the U.S.
 4 District Court for the Western District of Washington by way of a Conditional Remand
 5 Order dated March 12, 2014. (Docket Entry No. 20)

6 14. On March 17, 2014, the Court entered a Minute Order requiring the
 7 remaining parties to file a Joint Status Report no later than April 4, 2014. (Docket Entry
 8 No. 23)

9 15. During e-mail discussions between counsel for Plaintiff, FBS, and Todd
 10 regarding the preparation of the Joint Status Report, counsel for Todd and FBS openly
 11 discussed with Plaintiff's counsel the fact that neither of them found evidence of having
 12 filed Initial Disclosures with the Court and that counsel for Todd wrote to counsel for
 13 Plaintiff and FBS that "[t]he issue is probably moot at this point and I do not know how to
 14 address it in the JSR at the point. I am open to suggestions." Attached hereto as
 15 Exhibit J is a true and correct copy of the e-mail string discussing the issue of the lack of
 16 any filed Initial Disclosures.

17 16. On April 4, 2014, the parties filed the Joint Status Report with the Court
 18 which did not address the issue of the lack of Initial Disclosures by FBS or Todd despite
 19 Plaintiff's counsel's knowledge of the issue.

20 17. In a second e-mail string between counsel for Plaintiff, FBS, and Todd
 21 regarding the preparation of the Joint Status Report, counsel for Todd on April 3, 2014,
 22 explicitly asks counsel for Plaintiff if she has any comments about the draft Joint Status
 23 Report and indicates "I haven't heard back from you regarding the e-mails below – the
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1 comments regarding the initial disclosures and changes to the JSR. Please get back to
2 me today so that I can get this filed by tomorrow's deadline." Also included within that e-
3 mail string is an e-mail from counsel for FBS to counsel for Todd and Plaintiff indicating,
4 "Looks like we issued reports in May 2012 of our experts and served our expert/fact
5 witness list when the case was in state court. I did not see an initial disclosure filed by
6 FBS." Attached hereto as Exhibit K is a true and correct copy of the e-mail string further
7 discussing the issue of the lack of any filed Initial Disclosures.
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9 18. Given the demonstrated lack of surprise or prejudice to Plaintiff, the lack of
10 bad faith on the part of FBS, the availability of a "cure" for the perceived ills of non-
11 disclosure, and Plaintiff's knowledge of these issues for at least one year, it is respectfully
12 submitted that no sanction or far lesser sanctions should be imposed in this case.

13 I hereby declare that the above statement is true to the best of my knowledge and
14 belief, and that I understand it is made for use as evidence in court and is subject to the
15 penalties of perjury under the laws of the State of Washington.
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17 DATED in Seattle, Washington, this 17th day of August, 2015.
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19 /s/ James E. Horne
20 James E. Horne, WSBA No. 12166
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1 DECLARATION OF SERVICE
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3 On the 17th day of August, 2015, I caused to be served the foregoing on all parties
4 in this action, via the U.S. District Court's ECF filing system.
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6 I declare under penalty of perjury under the laws of the State of Washington that
7 the foregoing is true and correct.
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9 Signed at Seattle, Washington, this 17th day of August, 2015.
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11 By: /s/ James E. Horne
12 James E. Horne, WSBA No. 12166
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